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Supreme Court, U.S.
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No. 97-640

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AMERICAN CITIGAS CO.,
Petitioner,

v.

VORYS, SATER, SEYMOUR & PEASE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the face of a clear conflict among the Circuits, Vorys Sater is forced to concoct a series of meritless obstacles that it hopes will deter this Court's review of the abstention issue squarely presented by this case. But each of the theories on which Vorys Sater rests its opposition is spurious. *First*, contrary to Vorys Sater's principal assertion, no court would have held this suit to be anything other than a declaratory-judgment action for purposes of the *Brillhart/Colorado River* distinction. *Second*, Vorys Sater's efforts to discredit the circuit split described in the petition are wholly insubstantial; they also stand in sharp contrast to its arguments below, in which it asserted that the law in the Sixth Circuit differed from that elsewhere. *See* Pet. 18 & n.23. *Finally*, Vorys Sater's attempt to impugn this case as an inappropriate vehicle for resolving the circuit split is nothing more than a meritless play on words.[1]

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[1] The Brief in Opposition also contains a lengthy "counterstatement of the case" that accomplishes little except to establish that this case is riddled with disputed issues of fact that make summary judgment inappropriate. *See, e.g.*, Br. in Opp. 5 ("The outcome of the meeting is disputed."); *id.* at 6 (referring to letter as "crypti[c]"). The counterstatement also contains several distortions of the record. Although page limitations prevent CitiGas from addressing each such instance, we feel compelled to address one. Vorys Sater wrongly insinuates that CitiGas fired the firm on a pretext as part of a premeditated scheme to deny Vorys Sater its 25% contingent fee. *See* Br. in Opp. 4, 5, 7. But the record item on which Vorys Sater rests this assertion (a memorandum by Robert Silverthorn Jr., to whom Vorys Sater incorrectly refers as CitiGas's "general counsel," Br. in Opp. 4) says something very different from what Vorys Sater tries to make of it. At the time Silverthorn Jr. wrote the memorandum in question, CitiGas had proposed that Vorys Sater content itself with a slightly reduced fee in light of claims made by other attorneys who had represented CitiGas before Vorys Sater (a proposal to which Vorys Sater later offered to agree). As is clear from the face of the memorandum, *see id.* at 4 ("no contribution should be asked from [Vorys Sater] with regard to . . . any other claim"), Silverthorn Jr. expressed disagreement with his father's "position" on *that* issue. To say that the memorandum

1. In arguing that this was not a declaratory-judgment action for abstention purposes, Vorys Sater leads with its chin. Vorys Sater points out that its complaint not only demanded a declaratory judgment permitting it to retain the more than $22 million it had already pocketed but also demanded approximately $2 million in damages. Vorys Sater argues that, in light of its damages claim, the entire lawsuit should be treated as a damages action (subject to *Colorado River*'s presumption in favor of retaining jurisdiction), and not as a declaratory-judgment action (subject to *Brillhart's* presumption against retaining jurisdiction). Vorys Sater would apparently have the Court believe that a declaratory-judgment plaintiff can avoid *Brillhart* by the simple expedient of adding a damages claim, meritorious or not, in the amount of even a peppercorn.[2]

Although Vorys Sater advanced this same argument below, neither the district court nor the court of appeals reached it; instead, both courts properly treated the case as a pure declaratory-judgment action. This Court's usual practice in such circumstances is to address the issue presented in the petition and allow the lower courts to address any other issues in the first instance on remand.[3] As the

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provides evidence of a master plan to fire Vorys Sater and deny it its fee is preposterous.

[2] Just how ill-advised such a rule would be is driven home forcefully by the facts of this very case. Vorys Sater's damages claim was clearly meritless and was obviously added for the sole purpose of defeating abstention. It asked for attorneys' fees (plus prejudgment interest going back all the way to the date of settlement) with respect to matching charitable contributions that had never been (and may never be) paid, even though the governing agreement provided that Vorys Sater was entitled at most to an additional fee upon "actual receipt of payment." Pet. 9. Vorys Sater prevailed on this claim in the district court only because of a procedural windfall: the district court concluded (mistakenly) that CitiGas failed to "present evidence" in opposing Vorys Sater's motion for summary judgment. *See id.* at 9-10 & n.10.

[3] *See, e.g., Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 64 (1987); *United States v. Rutherford*, 442 U.S. 544, 559 n.18 (1979); *United States v. Nobles*, 422 U.S. 225, 241 n.16 (1975).

Court has stated, a possible "alternative ground" for affirmance "does not prevent us from reviewing the ground exclusively relied upon by the courts below." *Perry v. Thomas*, 482 U.S. 483, 492 (1987).

In any event, Vorys Sater's argument is transparently meritless: no court has held a suit like Vorys Sater's to be anything other than a pure declaratory-judgment action for purposes of the *Brillhart/Colorado River* distinction. The Ninth Circuit, whose case law on this point is most fully developed, has held that, when a damages claim is "wholly dependent" upon a declaratory-judgment claim, the entire lawsuit must be treated as a declaratory-judgment action. For purposes of this test, a damages claim is "wholly dependent" if it would necessarily fall along with the declaratory-judgment claim.[4] Under this standard, it is clear that Vorys Sater's suit is a pure declaratory-judgment action subject to *Brillhart*'s (not *Colorado River*'s) standard: a loss on Vorys Sater's declaratory-judgment claim would necessarily have meant a loss on its claim for damages.[5]

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[4] *See Golden Eagle Ins. Co. v. Travelers Cos.*, 103 F.3d 750, 755 (9th Cir. 1996) ("Golden Eagle's request for monetary relief is wholly dependent upon a favorable decision on its claim for declaratory relief."); *Ark Telecommunications, Inc. v. State Farm Fire & Cas. Co.*, 1997 U.S. App. Lexis 16202, at *6 (9th Cir. June 27, 1997) ("appellees' claims are not 'wholly dependent' upon a favorable decision in the declaratory relief action"); *Cassio Place, Inc. v. Great Am. Ins. Co.*, 1996 U.S. Dist. Lexis 6806, at *6-*7 (N.D. Cal. Apr. 30, 1996) ("[t]he success of these [damages] claims, however, depends entirely upon the Court first favorably resolving [the] claim for declaratory relief"). The Eighth Circuit has applied a test that is even less friendly to Vorys Sater than that of the Ninth Circuit: the Eighth Circuit's test turns on whether the suit is predominantly one for declaratory relief or one for damages. *See Horne v. Firemen's Retirement Sys. of St. Louis*, 69 F.3d 233, 235, 236 (8th Cir. 1995).

[5] Pointing to CitiGas's counterclaim for damages (which the district court rejected on the same mistaken ratification rationale as that on which it rested its declaratory judgment), Vorys Sater also argues, in effect, that a declaratory-judgment defendant waives any abstention argument by filing a counterclaim. It says that "[t]he

Vorys Sater tries to escape this conclusion by giving the "wholly dependent" standard a cramped and entirely unsupported reading. Though acknowledging that the Ninth Circuit held damages claims to be "wholly dependent" in *Golden Eagle Insurance Co. v. Travelers Cos.*, 103 F.3d 750 (9th Cir. 1996), and *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796 (9th Cir. 1995), Vorys Sater argues that the damages claims there were "dependent" in the sense that the plaintiff insurance companies asked for damages only as alternative relief in case the court would reject their declaratory claims. *See* Br. in Opp. 17 n.7. Vorys Sater apparently believes that this is the *only* way in which a damages claim can be "wholly dependent."

But *Golden Eagle* and *Karussos* themselves show that this is not so. In both cases, an insured who had two insurers was sued in state court; the first insurer defended the insured, but the second insurer refused, saying that its policy did not cover the incident at issue. The first insurer then sued the second in federal court, demanding (1) a declaratory judgment that the second was required to defend and indemnify, and (2) damages to contribute to expenses incurred in defending the insured. *See Golden Eagle*, 103 F.3d at 753; *Karussos*, 65 F.3d at 798. Under *those* circumstances, the Ninth Circuit held that the first insurer's damages claim was "wholly dependent upon a

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Ninth Circuit has followed the same analysis in counterclaim situations, when one party seeks purely declaratory relief but the other seeks money damages." Br. in Opp. 17. But the case on which it relies, *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361 (9th Cir. 1991), involved a "counterclaim situation" only in the sense that the *defendant* had requested a declaratory judgment—the plaintiff had asked only for damages. That simply is not the case here. In *St. Paul Fire & Marine Ins. Co. v. F.H.*, 117 F.3d 435 (9th Cir. 1997), a case not cited by Vorys Sater, the defendant did request damages relief, but that case is inapposite for another reason: in *St. Paul*, there was no parallel state action, and it was the *plaintiff* who, only after losing on the merits, argued that the district court should have abstained from hearing the plaintiff's own declaratory-judgment claim. *See id.* at 436-38.

favorable decision on its claim for declaratory relief." *Golden Eagle*, 103 F.3d at 755; *see Karussos*, 65 F.3d at 801 ("If a party could avoid [the presumption] rule by the simple expedient of including [a damages claim] in its complaint, there would be little if anything left of that rule."). There was nothing alternative about the insurers' damages claims.

Unable to distinguish *Karussos* and *Golden Eagle*, Vorys Sater indiscriminately cites cases that have nothing to commend them to Vorys Sater's position other than their outcome: in these cases, courts found that, on the facts before them, the specific claims at issue were not "wholly dependent." *See* Br. in Opp. 16-18. But none of these cases can help Vorys Sater: in each, the damages claim was independent of the declaratory claim because the damages claim could prevail even if the declaratory-judgment claim failed.[6] In sum, Vorys Sater's argument

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[6] *See Polido v. State Farm Mut. Auto. Ins. Co.*, 110 F.3d 1418, 1420 n.1, 1421 n.4 (9th Cir. 1997) (besides asking for declaratory judgment that insurance company was required to defend, insured demanded damages for infliction of emotional distress); *Chamberlain*, 931 F.2d 1367-68 (insured sued insurance company demanding damages for bad-faith refusal to defend; defendant insurance company counterclaimed for declaratory judgment); *Polonitza v. Chubb Group of Ins. Cos.*, 1997 U.S. App. Lexis 16405, at *3 (9th Cir. July 2, 1997) (unpub. mem.) (besides asking for declaratory judgment that insurance company was required to defend, insured demanded "monetary relief," apparently for indemnity; court did not discuss "wholly dependent" standard); *Ark*, 1997 U.S. App. Lexis 16202, at *5-*6 (besides asking for declaratory judgment that insurance company was required to defend, insured demanded money damages on "bad faith claims" against insurer; court held that these claims were "not 'wholly dependent' upon a favorable decision in the declaratory relief action"); *Smith Mailer Mfg. v. Liberty Mut. Ins. Co.*, 1997 U.S. App. Lexis 18882, at *6 (9th Cir. July 21, 1997) (unpub. mem.) (besides asking for declaratory judgment that insurance company was required to defend, insured asserted "bad faith claims for money damages" against insurer); *Southwind Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 948, 950, 951 (5th Cir. 1994) (after aircraft's owner failed to pay for repairs, repair company sued owner for damages and for declaration that it was entitled to certain collateral).

that its suit is not a declaratory-judgment action for purposes of the *Brillhart/Colorado River* distinction is entirely meritless.

2. Next, Vorys Sater attempts to minimize the circuit split at issue—the same circuit split that it affirmatively asserted in the courts below. *See* Pet. 18 & n.23. Although Vorys Sater is compelled to concede that the Ninth Circuit has applied a presumption against the exercise of federal jurisdiction in the face of parallel state-court litigation, *see* Br. in Opp. 19,[7] Vorys Sater argues that the Ninth Circuit's presumption applies only in insurance cases, *see id.* at 19-20. But this argument flies in the face of the Ninth Circuit's own words: that court has said on numerous occasions that its presumption applies in "insurance coverage *and other declaratory relief actions*."[8] The fact that most of the relevant cases arose in an insurance context is simply a function of the fact that "the federal courts' declaratory judgment jurisdiction

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[7] Vorys Sater suggests, however, that the Ninth Circuit's grant of rehearing en banc in *Government Employees Ins. Co. v. Dizol*, 108 F.3d 999 (9th Cir.), *reh'g en banc granted*, 118 F.3d 661 (9th Cir. 1997), indicates that it is "taking steps to reconsider [the presumptive] line of cases." Br. in Opp. 2; *see id.* 19 n.8. Vorys Sater once again overplays its hand. In *Dizol*, the question presented was whether a court of appeals must raise the *Brillhart* abstention issue on its own motion when neither the district court nor the parties have addressed it. *See Dizol*, 108 F.3d at 1006. The scheduling order cited in the petition clearly indicates that the court decided to rehear the case en banc with a view to addressing that question, *see* Pet. 19 n.24; *see also St. Paul*, 117 F.3d at 437; the oral argument before the en banc court accordingly revolved around precisely that issue. (CitiGas has lodged with the Clerk of this Court copies of both the Ninth Circuit's scheduling order and the tape recording of the en banc oral argument.) If this Court nevertheless were to determine that its decision concerning certiorari might turn on the outcome in *Dizol*, it should hold this petition until the Ninth Circuit issues its decision. Because the Ninth Circuit heard en banc argument on July 24, 1997, a decision should be imminent.

[8] *See, e.g., Maryland Cas. Co. v. Knight*, 96 F.3d 1284, 1288 (9th Cir. 1996); *Karussos*, 65 F.3d at 798; *American Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1019 (9th Cir. 1995); *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1374 (9th Cir. 1991).

has been invoked in insurance litigation more often than in any other area." *Dizol*, 108 F.3d at 1008 (internal quotation marks omitted); *see* Pet. 20. Indeed, the Ninth Circuit most assuredly *has* applied the presumption outside the insurance context.[9]

Vorys Sater also suggests that each of the many Ninth Circuit cases cited in the petition is distinguishable on the ground that none of them involved state-court proceedings in which the applicable substantive law was that of another state. *See* Br. in Opp. 21. But Vorys Sater fails to provide any insight as to why this should make a difference. *Brillhart*'s rule is rooted in concerns about "interference with the orderly and comprehensive disposition of a state court litigation." *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 495 (1942). Such interference offends federalism principles equally regardless of which jurisdiction's substantive law applies. *See Exxon*, 120 F.3d at 169-70 (requiring abstention even though *federal* substantive law applied).[10]

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[9] *See Exxon Shipping Co. v. Airport Depot Diner, Inc.*, 120 F.3d 166, 169-70 (9th Cir. 1997). Vorys Sater dismisses *Exxon* on the ground that the Ninth Circuit did not use the word "presumption." *See* Br. in Opp. 20 n.9. But the Ninth Circuit held that the district court had abused its discretion by retaining jurisdiction; particularly because federal law applied to the merits of the dispute, the court of appeals could reach that outcome only if it applied a presumption. *Compare Exxon*, 120 F.3d at 169-70, *with Youell v. Exxon Corp.*, 74 F.3d 373, 376 (2d Cir.), *cert. denied*, 116 S. Ct. 2514 (1996); *see* Pet. 19. Vorys Sater also tries to paint *Exxon* as sui generis, suggesting that the Ninth Circuit's decision was based solely on its displeasure with the district court's intimation that its ruling would be "binding in the state proceedings." Br. in Opp. 20 n.9. In fact, the Ninth Circuit held simply that the district court's disagreement with the state court on the merits of certain legal issues provided no "factor in favor of exercising jurisdiction." *Exxon*, 120 F.3d at 167, 169-70. Thus, far from holding that there were special reasons affirmatively militating in favor of abstention, the Ninth Circuit held merely that the factor on which the district court had relied did not militate against abstention.

[10] As one district court in Virginia recently noted in deferring to a state-court proceeding in Florida in which Virginia's substantive law would apply: " 'Our Federalism' demands deference to Florida's

Finally, Vorys Sater claims that the Ninth Circuit has held that "a district court's decision to exercise jurisdiction is not a ground for reversal when the district court has already rendered final judgment and reached the right answer on the merits." Br. in Opp. 21. The Ninth Circuit has never held such a thing. Although the Ninth Circuit has sometimes applied a harmless-error exception where it was crystal clear that a state court could have reached no result except that reached by the district court, *see Golden Eagle*, 103 F.3d at 756, it has refused to apply that exception where the applicable state-law issues were "unsettled." [11] The court below never addressed this question, and, if it had, it would have resolved the question against Vorys Sater: Vorys Sater does not (and could not) argue that the state-law issues here are settled.

Vorys Sater chooses a different line of attack on the Fifth Circuit. While conceding that the Fifth Circuit has applied a presumption against the exercise of jurisdiction, Vorys Sater argues that "[t]he Fifth Circuit . . . has given no indication that [the presumption] survive[s] *Wilton*."

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strong State interest in deciding a case calling for the application of a sister State's law. Certainly the Florida court can apply Virginia, Kansas, or Maryland substantive law under the applicable choice of law rule as well as this court could under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Granting a stay of the [declaratory judgment] action in deference to the Florida action acknowledges this reality." *Perdue Farms, Inc. v. Hook*, 1997 U.S. Dist. Lexis 16567, at *20 (W.D. Va. Oct. 17, 1997). One Ninth Circuit decision—again not cited by Vorys Sater—could be read to suggest that, in certain circumstances, the fact that out-of-state law applies in the state action might be relevant to the absention question. *See Allstate Life Ins. Co. v. Roth*, 1996 U.S. App. Lexis 27743, at *6 n.2 (9th Cir. Sept. 18, 1996) (unpub. mem.). But this decision, which lacks precedential value in the Ninth Circuit and which treated the issue summarily in a footnote, clearly did not survive the *Exxon* decision cited in the text.

[11] *See, e.g., Nucor Corp. v. Aetna Cas. & Sur. Co.*, 1997 U.S. App. Lexis 6155, at *5-*6 (9th Cir. Mar. 28, 1997) (unpub. mem.); *Allstate Ins. Co. v. McFarlin*, 1997 U.S. App. Lexis 6135, at *8 (9th Cir. Mar. 28, 1997) (unpub. mem.); *Dizol*, 108 F.3d at 1008; *Karussos*, 65 F.3d at 799-800 n.1.

Br. in Opp. 22. But there is no reason to think that it would not survive *Wilton*. *See* Pet. 20-21. District courts within the Fifth Circuit have accordingly continued to apply the applicable presumption even after *Wilton*. *See, e.g., Little Giant Mfg. Co. v. Chromalox Indus. Heating Prods.*, 1996 U.S. Dist. Lexis 9079, at *18-*19 (E.D. Tex. June 26, 1996); *Bituminous Fire & Marine Ins. Co. v. Fontenot*, 907 F. Supp. 193, 196-97 (M.D. La. 1995); *Canal Indem. Co. v. Wilburn Container X-Press, Inc.*, 907 F. Supp. 185, 188-89 (M.D. La. 1995).[12]

3. Finally, Vorys Sater claims that this case is not a good vehicle for resolving the circuit conflict because the district court said that it involved "unique circumstances." But this is merely a play on words. "Extraordinary circumstances" for purposes of the *Brillhart* analysis exist when the issues in the federal action *cannot* be litigated in the state forum.[13] Vorys Sater does not—and cannot—identify any such circumstances here, because none exist. *See* Pet. 23. By contrast, the district court's "unique circumstances," besides being insubstantial on their own terms, *see id.* at 24, reflect the district court's perception of which forum would be better suited and more con-

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[12] Vorys Sater relies heavily on *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 84 (5th Cir.), *cert. denied*, 118 S. Ct. 69 (1997), but that decision cannot bear the weight Vorys Sater places on it. Although the Fifth Circuit there affirmed a district court's decision rejecting an abstention motion, the Fifth Circuit's opinion dealt with the issue in a single paragraph that did not mention any of the Fifth Circuit cases cited in the petition. *See* Pet. 15 n.14. That is not surprising: the *Valsamis* defendants' briefs had not even cited the seminal Fifth Circuit case of *Texas Employers' Insurance Ass'n v. Jackson*, 862 F.2d 491 (5th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989), and indeed affirmatively (and wrongly) argued that "the Fifth Circuit standard for exercising declaratory judgment jurisdiction allows the district court broad discretion." Reply Br. of Appellants, *Cornhill Ins. PLC v. Valsamis, Inc.*, No. 95-20898 (5th Cir. filed May 24, 1996). Thus, *Valsamis* can hardly be read as the Fifth Circuit's sub silentio overruling of its pre-*Wilton* presumption cases.

[13] *See generally Brillhart*, 316 U.S. at 495-96.

venient for the resolution of the issues,[14] a consideration that is irrelevant under the proper standard. In any event, the *court of appeals* did not see any "unique circumstances" in this case, *see* Pet. App. 5a-6a, and it is clear that, under the proper standard, it could not have found any such circumstances.

In sum, none of Vorys Sater's objections to review have any merit. There is a conflict among the Circuits; the presumption-less approach of the courts below is clearly in error; and the circumstances of this case, in which the court of appeals permitted the district court to pre-empt a state-court suit on the eve of trial, make it a particularly appealing vehicle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 18, 1997

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[14] *See, e.g.*, Pet. App. 23a.